76-1076

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAILROAD RETIREMENT BOARD, APPELLANT

v.

ANTHONY S. KALINA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*), is reported at 541 F. 2d 1204. The opinion of the Railroad Retirement Board (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*), holding that Section 2(f) of the Railroad Retirement Act of 1937, 45 U.S.C. 228b(f), is unconstitutional, was entered on September 13, 1976. A notice of appeal to this Court (App. C, *infra*) was filed October 7, 1976. On November 29, 1976, Mr. Justice Stewart extended the time for docketing the appeal to and including February 4, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763, n. 8.

QUESTION PRESENTED

Whether Section 2(f) of the Railroad Retirement Act of 1937 invidiously discriminates by conditioning a husband's eligibility for a spouse's annuity upon proof that he was receiving at least one-half his support from his wife, whereas a wife's eligibility is not similarly conditioned upon proof that she was supported by her husband.

STATUTE INVOLVED

Section 2(f) of the Railroad Retirement Act of 1937, as added, 65 Stat. 684, and amended, 45 U.S.C. (1970 ed.) 228b(f), provided in pertinent part:

> For the purposes of section 228a to 228c-1, 228e to 228h and 228i to 228s-2 of this title, the term "spouse" shall mean the wife or husband of a retirement annuitant or pensioner who (i) was married to such annuitant or pensioner for a period of not less than one year immediately preceding the day on which the application for a spouse's annuity is filed * * * and (ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began.[1]

STATEMENT

In 1972, appellee Anthony S. Kalina applied to the Railroad Retirement Board[2] for a spouse's annuity pursuant to Section 2(e) of the Railroad Retirement Act of 1937, 45

[1]The 1937 Act as revised and amended, effective January 1, 1975, has been redesignated the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. (Supp. V) 231 *et seq*. It includes a virtually identical half-support requirement. 45 U.S.C. (Supp. V) 231a(c)(ii).

[2]The Railroad Retirement Board is an independent agency in the executive branch of the United States government responsible for administration of the Act. 45 U.S.C. (1970 ed.) 228j(a).

U.S.C. (1970 ed.) 228b(e). His application was denied because he failed to establish, as Section 2(f)(ii) requires, that he had been "receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began." 45 U.S.C. (1970 ed.) 228b(f)(ii) (App. D, *infra*).[3]

Appellee then sought review of the Board's decision in the court of appeals pursuant to 45 U.S.C. (1970 ed.) 228k and 355(f). He contended that Section 2(f) was unconstitutionally discriminatory in that no similar showing of support is required as a condition of a wife's eligibility for spouse's benefits.

The court of appeals held the half-support requirement unconstitutional on the basis of *Frontiero* v. *Richardson*, 411 U.S. 677, and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636. The court remanded the case to the Board with directions that the Board reconsider appellee's eligibility for spouse's benefits without regard to that requirement (App. A, *infra*).

THE QUESTION IS SUBSTANTIAL

As the court of appeals noted (App. A, *infra*, pp. 9a, 10a), the question presented here is similar to the one that arises under the analogous provisions of the Social Security Act. In *Mathews* v. *Goldfarb*, No. 75-699, argued October 5, 1976, this Court has before it the question whether Section 202(f) of the Social Security Act, as amended, 42 U.S.C. 402(f), invidiously discriminates because it provides for widower's insurance benefits only if the widower had received at least one-half of his support from his deceased wife, whereas

[3]The other conditions of eligibility are set forth in Section 2(e). The railroad employee must have been awarded an annuity or pension under the Act and attained the age of 65, and the applying spouse also must have attained that age.

widow's insurance benefits are payable even though the widow had not received at least one-half her support from her deceased spouse.[4]

The considerations that bear upon the constitutionality of the half-support provision of Section 2(f) of the Railroad Retirement Act of 1937 would appear to be basically the same as those that this Court will find determinative with respect to the similar provision of Section 202(f) of the Social Security Act in *Goldfarb*. The two provisions appear likely to stand or fall together.

CONCLUSION

The Court should hold this case pending the decision in *Goldfarb* and then dispose of it on the basis of that decision.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DALE G. ZIMMERMAN,
General Counsel,
Railroad Retirement Board.

FEBRUARY 1977.

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[4]We are furnishing a copy of the government's brief in *Goldfarb* to counsel for appellee.

DOJ-1977-02

APPENDIX A

No. 75-2256

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANTHONY S. KALINA, *Petitioner,* v. RAILROAD RETIREMENT BOARD, *Respondent.*	ON PETITION to Review Decision of the Railroad Retirement Board.

Decided and Filed September 13, 1976.

Before: PECK and MCCREE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

MCCREE, Circuit Judge. This is a petition to review the Railroad Retirement Board's decision that Anthony Kalina is not entitled to a spouse's annuity under the Railroad Retirement Act of 1937, 45 U.S.C. §§ 228a – 228z-1 because he did not establish that he was receiving at least one-half of his support from his wife on the date that her annuity as a retired railroad worker began. Petitioner challenged the constitutionality of section 2(f) of the Act, 45 U.S.C. § 228 b (f)(ii), which defines the term "spouse,"[1] but the Board refused to

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[1] The Railroad Retirement Act of 1937, 45 U.S.C. §§ 228a-228z-1, was completely revised by Pub. L. 93-445, October 16, 1974, 88 Stat. 1305, effective January 1, 1975. The revised and amended act was redesignated the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231t. The challenged definition of a "spouse" for the purpose of a spouse's annuity was re-enacted in virtually identical language at 45 U.S.C. § 231a(c)(3)(ii):

consider his contention, stating that "[q]uestions of constitutionality are for the courts and not the administrative agencies to rule upon." Our jurisdiction is based upon 45 U.S.C. §§ 228k and 355(f).

We hold that § 228b(f)(ii) violates the equal protection component of the due process clause because it provides dissimilar treatment for men and women who are similarly situated, without a legally sufficient basis for the discrimination. Accordingly, petitioner Kalina is entitled to a spouse's annuity.

Petitioner's wife, Emilie Kalina, is a retired railroad employee who receives a retirement annuity pursuant to section 2(a)(1) of the Act, 45 U.S.C. § 228(a)(1). According to her uncontroverted testimony before the Board, Mrs. Kalina began working in the railroad industry about 1920. She married petitioner in 1969, and began receiving her annuity in 1971, shortly after the last day on which she worked in the railroad industry. She was then about 70 years of age. In her application for her annuity, Mrs. Kalina listed her position as chief clerk. In answer to the question whether her husband was dependent upon her for more than one-half of his support, she answered "no."

In 1972, petitioner filed an application for a spouse's annuity. When the Bureau of Retirement Claims determined that petitioner was not entitled to an annuity, he appealed to the Railroad Board. The evidence before the Board indicated that for many years before his marriage, petitioner lived with Mrs. Kalina who was a distant cousin, and that Mrs. Kalina maintained the home and paid its expenses without any financial help from petitioner. Petitioner, who first came to this country in 1948, is a teacher. His employment has been irregular. The Board found that in the 12 months before Mrs. Kalina began receiving her annuity, her income was approxiately $7,600; while during the same period, petitioner, who had found employment as a college teacher in another state, earned about $8,400. The Board determined that petitioner had not established that he was receiving over one-half of his support from Mrs. Kalina at the time her annuity began. Accordingly it concluded that he was not entitled to a spouse's annuity.

[For purposes of this subchapter the term "spouse" shall mean the wife or husband of an annuitant . . . who . . .]
. . .(ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's annuity under subsection (a)(1) of this section began.

The only change from the earlier version was the addition of a cross reference to the wife's annuity provision. The original version stated:

(ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began.

Section 2(f) of the Railroad Retirement Act provides that the term spouse for the purposes of spouse's annuity shall mean:

> (i) . . . the wife or husband of a retired annuitant . . .; and
>
> (ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began.

For the purpose of this appeal, petitioner does not contest the Board's determination that he was unable to prove that he received over one-half of his support from his wife at the time her annuity began. The issue before us is whether the equal protection component of the Fifth Amendment due process clause is violated by a provision requiring the spouse of a retired *female* railroad employee, but not the spouse of a retired *male* employee, to prove actual dependency in order to qualify for a spouse's annuity.

The parties have devoted much of their argument to the question whether sex is a suspect classification that requires strict scrutiny of the asserted justification for disparate treatment to avoid offending the equal protection and due process clauses. However, we find it unnecessary to reach this issue, because the Supreme Court's recent decision in *Frontiero* v.

Richardson, 411 U.S. 677 (1973) and *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) control this case.

In *Frontiero*, the Court considered 37 U.S.C. §§ 401, 403 and 10 U.S.C. §§ 1072 and 1076, which required a female member of the uniformed services who sought housing and medical benefits for her spouse to prove dependency in fact (i.e. that she contributed over one-half of her husband's support), although male members of the services were not required to prove that their wives were dependent in fact in order to obtain the same benefits. The Court held that this requirement violated the due process clause of the Fifth Amendment. Four members of the Court held that sex is an inherently suspect classification, like race, alienage, and national origin. Accordingly, they subjected the challenged discrimination to "close judicial scrutiny." The sole basis for the different treatment was the sex of the persons involved. The statute denied benefits to a female member who provided less than one-half of her spouse's support, although it granted benefits to a male member in the same circumstance. The government contended that this different treatment for men and women similarly situated was justified by "administrative convenience." However, as the plurality opinion observed, no evidence was submitted showing that this procedure was less costly than one requiring all service members to prove the dependency of their spouses. The plurality opinion held that the challenged statutes, by according different treatment to males and females similarly situated for the sole purpose of administrative convenience, violated due process, citing *Reed* v. *Reed*, 404 U.S. 71 (1971).

Justice Stewart concurred in the judgment, stating only that he agreed "that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U.S. 71." 411 U.S. 691.

Justice Powell, with whom the Chief Justice and Justice Blackmun concurred, found it unnecessary to determine whether sex was a suspect classification. They stated that in

their view *Reed* v. *Reed* abundantly supported the Court's decision.[2]

More recently, in *Schlesinger* v. *Ballard*, 419 U.S. 498, 507 (1975), the Court restated *Frontiero*:

> In both *Reed* and *Frontiero* the challenged classifications base on sex were premised on overboard generalizations that could not be tolerated under the Constitution. . . . In *Frontiero*, the assumption underlying the Federal Armed Services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

Later in the same year, the Supreme Court invalidated 42 U.S.C. § 402(g), which provided that Social Security survivors' benefits based on the earnings of a deceased *husband* and father were payable *both* to the couple's minor children and to the widow, although benefits based upon the earnings of a deceased *wife* and mother were payable only to the couple's minor children, and *not* to the widower. In *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975)[3] the Court held that the

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[2] Justice Rehnquist dissented "for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero* v. *Laird*, 341 F. Supp. 201 (1972)." 411 U.S. 691.

[3] Justice Douglas took no part in the case.

Justice Powell wrote a separate concurring opinion, in which Chief Justice Burger joined, to "identify the impermissible discrimination effected by § 402(g) somewhat more narrowly than the Court does." 420 U.S. 654. Justice Powell emphasized that the statute "impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." He concluded that "no legitimate governmental interest supports this gender classification." 420 U.S. 654-655. He emphasized the fact that Social Security is designed for the protection of the "family," and although it lacks a contractual basis, it is a contributory system. Likewise the railroad retirement program is a contributory system which is designed to protect the worker and his family, and no legitimate governmental interest supports the practice of providing Mrs. Kalina's family less protection than is provided for the family of a male employee.

Justice Rehnquist concurred separately in order to emphasize that analysis of the legislative history and statutory context of § 402(g)

gender-based distinction made by § 402(g) is indistinguishable from that invalidated in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). *Frontiero* involved statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless she proved that she supplied more than one-half of her husband's support. The Court held that the statutory scheme violated the right to equal protection secured by the Fifth Amendment. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), explained: "In . . . *Frontiero* the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution. . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not." *Id.*, at 507. A virtually identical "archaic and overbroad" generalization, *id.*, at 508, "not . . . tolerated under the Constitution" underlies the distinction drawn by § 402(g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support.[11] [Footnote omitted.] 420 U.S. 642-643.

The Court observed that although the assumption that men are more likely than women to be the primary supporters of their families "is not entirely without empirical support," nevertheless,

> such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support. 420 U.S. 645.

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[11] "establishes that the Government's proffered legislative purpose is so totally at odds with the context and history of § 402(g) that it cannot serve as a basis for judging whether the distinction between men and women serves a valid legislative objective." 420 U.S. 655. Accordingly, Justice Rehnquist found it unnecessary to reach the issue whether the statute "violates the Fifth Amendment as applied in *Frontiero* v. *Richardson* . . . ." 420 U.S. 655.

The Court rejected the argument that the noncontractual nature of Social Security benefits permitted Congress to provide a covered female employee with fewer benefits than it provided for a covered male. It also rejected the contention that the classification under attack was one "reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families." 420 U.S. 648. The Court held that "the mere recitation of a benign, compensatory purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying a statutory scheme." 420 U.S. 648. The Court reasoned that "[g]iven the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of 402(g) is entirely irrational." 420 U.S. 651.

The Court concluded:

> Since the gender-based classification of § 402(g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*. Like the statutes there, "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause." *Reed* v. *Reed*, 404 U.S. 71, 77 (1971). 420 U.S. 653.

The same reasoning applies here. The legislative history of the provision of the Railroad Retirement Act challenged here suggests no reason for the discriminatory treatment of male and female employees with respect to the spouse's annuity. The House Committee omitted a spouse's annuity that had been proposed in an earlier draft of H.R. 3669 because the provision was considered too controversial. The Committee Report stated that the spouse's annuity was "opposed as being unfair to unmarried men." 1951 Code Cong. & Admin. News 2536-2537. It is also observed that the actuarial evidence regarding the effect on the fund was conflicting. 1951 Code

Cong. & Admin. News 2537. The Senate version of the bill, however, included a spouse's annuity provision, and the Conference Committee Report merely states,

> The Senate Amendment to the text of the bill provided for an annuity for the widower of a deceased railroad employee, where such widower had attained 65 years of age and had been receiving at least one-half of his support from his wife employee at the time of her retirement or death. The bill as passed [sic] the House contained no such provision. The conference substitute follows the language of the Senate amendment in this respect. 1951 Code Cong. & Admin. News 2557.

The legislative history also discloses that the annuity was added as part of an extensive revision of the Railroad Retirement Act intended to increase benefits to meet the "desperate" and "urgent" needs of "retired workers *and their families.*" 1951 Code Cong. & Admin. News 2529. [Emphasis added.] Congress sought to increase the benefits to a level at least equal to that of Social Security benefits, because railroad employees contributed at a higher rate than the employees covered by Social Security. The Railroad Retirement Board, which supported H.R. 3669, provided an analysis of the challenged provision:

> The new subsection (g) defines "spouse" . . . . If the spouse is the husband of the employee he must have been receiving at least one-half of his support from his wife at the time her annuity or pension began.
>
> *The term "spouse" is defined in the same terms as husband and wife, respectively, under the Social Security Act,* except that under the Railroad Retirement Act the husband is not required to file proof of support within any specific period of time. Hearings on H.R. 3669 before the Committee on Interstate and Foreign Commerce, 82nd Cong., 1st Sess., 66 (1951). [Emphasis added.]

The Board argues that the purpose of the spouse's annuity was to provide increased benefits "in cases of greatest need, that is to say where two people must live on the benefits provided under the Railroad Retirement Act." H.R. Rep. No. 976, 82nd Cong., 1st session, on H.R. 3669, 49 (1951). The Board concludes that "[a]lthough the legislative history of section 2(f)(ii) does not expressly state that one of the goals to be achieved by its enactment would be to partially redress economic discrimination practiced against women, that purpose is implicit in the stated legislative purpose of providing added security for married couples." The Board contends that Congress concluded that the wife of a male railroad employee was less likely to have been engaged in employment that would yield a substantial income and adequate retirement benefits than was the husband of a female employee. The Board cites a large body of statistics to demonstrate that in 1950, women in the American work force were paid substantially lower wages than men, and that this disparity has continued until the present.

Although women have been and continue to be at a disadvantage in the labor market, as the Supreme Court observed in *Weinberger*, "the mere recitation of a benign compensatory purpose" is no justification for a statutory scheme that imposes yet another and different sex-based discrimination. It is clear that the primary legislative purpose is enacting the spouse's annuity provision was to increase benefits to retired workers *and their families.* As often happens in legislative drafting, the challenged term "spouse," which conclusively presumed that the wife of a male employee was dependent, but required the husband of a female employee to prove dependency in fact, was simply borrowed from the Social Security Act. It is not unreasonable to conclude that when Congress adopted the Social Security Act definition that resulted in the discriminatory treatment of female employees it embraced the "archaic and overbroad generalization" that "male workers' earnings are vital to the support of their families, while the earnings of

female wage earners do not significantly contribute to their families' support" that the Supreme Court rejected in *Weinberger* v. *Weisenfeld*, 420 U.S. 643. *Frontiero* and *Weinberger* make it clear that this generalization may not be relied upon to "denigrate the efforts" of women, like Mrs. Kalina, who work and whose earnings contribute significantly to the support of their families. Moreover, since the purpose of the spouse's annuity was to provide a desperately and urgently needed increase in the benefits paid to railroad workers and their families, the gender-based distinction challenged here, like those in *Frontiero* and *Weinberger*, is "entirely irrational."

Moreover, each of the four courts that have considered challenges to the analogous section of the Social Security Act, 42 U.S.C. § 402(c)(1)(C), have also concluded that the discrimination in that section violated the equal protection component of the Due Process clause. *Silbowitz* v. *Secretary of H.E.W.*, 397 F. Supp. 862 (S.D. Fla. 1975), U.S. App. pending, 44 U.S.L.W. 3352; *Coffin* v. *Secretary of H.E.W.*, 400 F. Supp. 953 (D.D.C. 1975), U.S. App. pending, 44 U.S.L.W. 3375, 3386; *Jablon* v. *Secretary of H.E.W.*, 399 F. Supp. 118 (D. Md. 1975), U.S. App. pending, 44 U.S.L.W. 3364; *Moss* v. *Secretary of H.E.W.*, 408 F. Supp. 403 (M.D. Fla. 1976). Section 402(c)(1)(C) provides that a husband of an individual entitled to old age or disability insurance is entitled to "a husband's insurance benefit" if he has filed an application, has attained the age of 62 and "was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, for such individual. . . ." In *Silbowitz*, for example, Chief Judge Fulton analyzed *Frontiero* and *Weisenfeld*, and concluded:

> Section 402(c)(1)(C) is the product of an identical stereotype: all women are dependent upon their husbands for their support. Thus, under § 402(b) all otherwise qualified wives of wage earners will receive benefits, irrespective of their dependency. Husbands are disqualified unless they are dependent. The discrimination is not

> related to family needs. Women who had no need of their husband's income receive benefits and enlarge the fund available to support husband and wife in their old age. Similarly situated husbands are denied benefits and the amounts available to meet the needs of those husbands and wives are less. Identically situated people are accorded different treatment solely on the basis of their sex.
>
> Like the statutes in *Frontiero* and *Wiesenfeld*, § 402(c)(1)(C), "'[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause' *Reed* v. *Reed*, 404 U.S. 71, 77, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971)." *Weinberger* v. *Wiesenfeld*, 420 U.S. 653, 95 S.Ct. at 1236. 397 F. Supp. 866.

Judge Fulton also rejected the government's contention that the statutory scheme was rationally connected with the Act's intention to provide benefits to those persons with the greatest needs:

> It is obvious that the statutes (§§ 402(b) and 402(c)(1)(C)) do not accomplish that purpose. Wealthy wives become entitled to benefits regardless of their dependency. Economically independent wives receive benefits without regard to their need. Indeed, if the public fisc is the concern, then a rational statute would require both male and female spouses to show dependency. The defendant's reliance upon *Geduldig*, is misplaced. While that case recognized the allocation of resources as a legitimate state interest, it did so in the context of a claim that women should be entitled to California state disability insurance benefits for pregnancy. In this case Mrs. Silbowitz is not seeking a benefit which, by its nature, is limited to women. Unlike the plaintiff in *Geduldig* she, as a covered worker, has paid for a benefit which a male would receive. The conservation of fiscal resources cannot be accomplished "by drawing invidious classifications." *Miller* v. *Laird*, 349 F.Supp. 1034, 1046

(3 judge ct. D.D.C. 1972); *Diaz* v. *Weinberger*, 361 F. Supp. 1, 11 (3 judge ct. S.D.Fla. 1973) (Set for reargument in the Supreme Court, 420 U.S. 959, 95 S.Ct. 1346, 43 L.Ed.2d 436).

Accordingly, he held that the grant of benefits to wives, but not to husbands, without a showing of dependency, served only administrative convenience, and that this purpose was insufficient to avoid a violation of due process.

Remedy

Since we hold that the different treatment of similarly situated male and female railroad employees (and derivatively, their spouses) violates due process, the only remaining question is the proper remedy. The Board suggests that we should not adopt a remedy that would impose additional costs on the overburdened retirement fund, a result that it predicts will follow a holding that Mr. Kalina (and, by implication, the husbands of other railroad workers) is entitled to a spouse's annuity without regard to proof of dependency. Instead, the Board suggests that we should hold that all spouses, female as well as male, of railroad employees must prove that they are dependent in fact in order to qualify for a spouse's annuity. This result would be contrary to the considered decision of Congress that spouses of male railroad workers are to be conclusively presumed dependent. And courts cannot disregard the directions of Congress so long as they are constitutional.[4] It would be incongruous if in adopting a remedy for a constitutional violation by the legislature we were to engage in improper judicial conduct.[5] The Board should address its con-

[4] *But see Moss* v. *Secretary of H.E.W.*, 408 F. Supp. 403 (M.D. Fla. 1976).

[5] Accordingly, we do not reach the subsidiary questions raised by the Board's argument, such as whether it would be necessary for all those wives of railroad employees who have already received spouse's annuities to prove that they were dependent in fact when their husbands' annuities began, and, if they are unable to do so, whether they should be required to repay the annuities received

cern for the solvency of the retirement fund to Congress, which, if persuaded, may in its judgment require all spouses to prove dependency in fact, or even eliminate the spouse's annuity entirely.

The decision of the Railroad Retirement Board is reversed and the case is remanded for a determination of the amount of annuity benefits due to petitioner without regard to section 2(f)(ii) of the Act. Petitioner shall receive the costs of this review.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2256

ANTHONY S. KALINA, Petitioner,

v.

RAILROAD RETIREMENT BOARD, Respondent.

Filed: September 13, 1976

Before: PECK and McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

On petition to review a Decision of the Railroad Retirement Board,

This, cause came on to be heard on the transcript of the record from the Railroad Retirement Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the decision of the Board is reversed and the case is remanded for a determination of the amount of annuity benefits due to petitioner without regard to section 2(f)(ii) of the Act.

It is further ordered that Petitioner recover from Respondent the costs on appeal, as itemized below, and that execution therefor issue out of said Railroad Retirement Board.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: October 13, 1976

COSTS: To be recovered by Petitioner

Printing. . .	$321.20
Filing. . . .	50.00
TOTAL	$371.20

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-2256

ANTHONY S. KALINA,

PETITIONER,

vs.

RAILROAD RETIREMENT BOARD,

RESPONDENT.

NOTICE OF APPEAL

Notice is hereby given that the Appellee, Railroad Retirement Board, appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252, from the judgment of this Court entered September 13, 1976, reversing the decision of the Railroad Retirement Board.

/s/ Dale G. Zimmerman
General Counsel

Filed October 7, 1976

APPENDIX D

RAILROAD RETIREMENT BOARD

APPEAL OF ANTHONY S. KALINA
R.R.B. No. A-713-01-4741

RAILROAD RETIREMENT ACT CLAIMS
APPEAL DOCKET No. 1484

At a meeting of the Railroad Retirement Board held on July 17, 1974, the Board adopted the following statement and decision in the claim of Anthony S. Kalina, hereinafter called appellant. Each member of the Board signing this decision reported that he had examined the record in the claim of the appellant and had considered the argument contained therein.

STATEMENT

This is an appeal from the decision of the appeals referee which sustained the determination of the Bureau of Retirement Claims (the Board's initial adjudicating unit) that the appellant was not receiving at least one-half of his support from his wife, the retirement annuitant, on January 28, 1971, the date on which her annuity began to accrue, and that he was not, therefore, entitled to a spouse's annuity under the provisions of Section 2(f) of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended [45 U.S.C. 228a *et seq.*].

Section 2(e) of the Act, insofar as pertinent, provides as follows:

> (e) Spouse's Annuity.—The spouse of an individual, if—(i) such individual has been awarded an annuity under subsection (a) . . . and has attained the age of 65, and (ii) such spouse has attained the age of 65 . . . shall be entitled to spouse's annuity . . .

Section 2(f) of the Act provides as follows:

> (f) For the purposes of this Act, the term "spouse" shall mean the wife or husband of a retirement annuitant or pensioner who (i) . . . and (ii) in the case of a husband, was receiving at least one-half of his support from his wife at the time his wife's retirement annuity or pension began.

On January 28, 1971, Mrs. Emile E. Kalina, filed an application for an employee age and service annuity under the Railroad Retirement Act. She stated that her husband was *not* dependent on her for half his support. She was awarded an annuity under Section 2(a) 1 of the Act effective January 28, 1971, the day after she last worked in the railroad industry. She says she began working in the railroad industry in 1920. She is now about 75 years of age. In her application she described hereself as chief clerk.

In August 1972 the appellant, who himself is now over 70 years of age, filed an application for a spouse's annuity as Mrs. Kalina's husband. They had been married on April 5, 1969, a little over three years before. He had been awarded an old age and service benefit under the Social Security Act as of Janaury 1970. They are distant cousins and for many years before they were married she had, according to their testimony, supported him in her own home in Lakewood, Ohio, maintaining the home, paying for the expenses, utilities, food, etc., without any financial help from him. He is a teacher by profession and came to this country in 1948. Social security records revealed little concerning his employment in the last decade, aside from a few brief teaching jobs in 1966-1968, and the evidence is his employment was spotty. The records show, however, that after their marriage he was credited with $2,000 in wages in the first quarter of 1970, $4,200 in the second quarter and $1,600 in the

third. In 1971 he was credited with $3,249.99 in the first quarter, and with $3,141.66 in the second, and $828.75 in the third. It appears that he had found employment as a teacher in a certain college in Minnesota in the spring term beginning in February 1970. Consequently, in the 12-month period before her retirement annuity began to accrue, on January 28, 1971, he and his wife lived together only in the month of January, then in part of July and August (the school holidays), and in part of September and part of December 1970. At all other times during that 12-month period he lived in Minnesota while his wife was still employed and living back in Ohio. He claims that while they were living together in this 12-month period, she contributed about $4,000 to his support and to the support of her household, and when they were not living together, she contributed $2,000 to his support. Her income in this 12-month period before her annuity began to accrue on January 28, 1971, was around $7,600 and his was around $8,400. Nevertheless, they argue that she was still contributing more than half of his support because of her expenses in maintaining her home in Ohio and because of the large professional expenses that he says he incurred in Minnesota in connection with his teaching hob. He actually lists around $6,500 professional expenses in connection with his job, even though his wages amounted, as stated, to only $8,400. He explains the expenditures of these funds on the grounds that he was trying to insure that he would be retained in the job in the future.

This explanation strikes the Board as highly implausible, expecially since, in view of his age, he could hardly have contemplated a career of any great number of years. His living expenses, apart from his professional expenses, came to about $8,000. On the basis of these figures, he and his wife maintain that she contributed to at least half of "his support" during this 12-month period.

The Board finds no convincing evidence in this record that Mrs. Kalina during this period made any such substantial contributions to appellant's support as are claimed. Although they kep very detailed records of their financial affairs, no specific evidence of her payments to him was submitted. Meticulous evidence was submitted showing that in 1970 she paid all the bills with respect to the maintenance and operation of the home in Lakewood but the question here relates solely to his support during the 12-month period mentioned. The Board cannot accept the contention that his professional expenses were as large as claimed and, if they were, they could not reasonably be taken into account in determining whether she supported him. On the contrary, the more reasonable inference in that event would be that he supported himself out of his teaching salary and, if she paid anything, she paid for his professional expenses and not for "his support." The Board cannot ignore the fact that Mrs. Kalina's income during the 12-month period in question was only $7,600 and during most of the 50 or so years of her railroad employment was considerably less than that. The Board cannot accept the kind of professional expenditures which he sets forth. It notes also that in his annual report to the Social Security Administration, dated February 24, 1972, of earnings for the year 1971, in connection with his own old age insurance benefit, he showed that his wages amounted to $7,220.00 and that they exceeded $140.00 in each month from January through July 1971. The circumstance that appellant obviously did not regard his professional expenses as reducing his 1971 earning for purposes of that report is a matter of some significance here. Some weight must also be given to the fact that in her application for a retirement annuity in Janaury 1971 she answered "No" to the question whether or not her husband was dependent on her for half of his support. These circumstances furnish some corroboration of the conclusion reached herein.

It is also argued that under the circumstances of this case it was unreasonable and unfair to determine the matter of his dependency on the basis of his financial circumstances in the 12-month period preceding his wife's retirement. He contends that he was dependent on his wife in every year from the time of their marriage, and even long before that, for at least one-half of his support. He points out that during those years he had income larger than his wife only in 1971. The Board cannot, however, ignore the express provision of the law that tells it to determine the question of "support" as of the time the wife's annuity began. From the beginning the Board has recognized that this provision must be given a realistic interpretation and the Board does not merely look to the precise date of the annuity's beginning, but looks to a period of a whole year before that date. For the Board to go back further, however, to more remote years, it would have to wholly disregard the plain direction in Section 2(f)(ii) of the Act which makes support at the time the wife's annuity began essential.

With respect to the argument of appellant that the dependency test of Section 2(f)(ii) is unconstitutionally discriminatory because it applies in the case of a male but not of a female applicant for a spouse's annuity, the courts do not permit administrative agencies, such as the Board, to consider such matters, since in doing so they would have to be examining into and passing on the constitutionality of provisions of the very law which brought them into existence and which they are charged with administering. Questions of constitutionality are for the courts and not for administrative agencies to rule upon.

DECISION

The decision of the appeals referee is affirmed.

/s/ James L. Cowen

/s/ Neil P. Speirs

/s/ Wythe D. Quarles, Jr.